

IN THE COURT OF APPEALS OF TENNESSEE  
AT NASHVILLE  
August 16, 2006 Session

**CAROLYN LOUISE POSS v. CHARLES DANIEL TURNER, ET AL.**

**Appeal from the Probate Court for Coffee County**  
**No. PW 02-78     Gerald L. Ewell, Sr., Judge**

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**No. M2005-01008-COA-R3-CV - Filed on January 24, 2007**

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The executrix of a decedent's estate brought this action against the decedent's son seeking a judgment for three alleged outstanding debts owed to the decedent. The trial court found in favor of the estate on all three debts and awarded the estate a judgment of \$138,747. We have concluded the evidence supports two of the claims but preponderates against the third. We therefore affirm in part and vacate in part.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Probate Court**  
**Affirmed in Part, Vacated in Part**

FRANK G. CLEMENT, JR., J., delivered the opinion of the court, in which WILLIAM C. KOCH, JR., P.J., M.S., and PATRICIA J. COTTRELL, J., joined.

Thompson G. Kirkpatrick, Manchester, Tennessee, for the appellant, Charles Daniel Turner.

Robert F. Hazard, Tullahoma, Tennessee, for the appellee, Carolyn Louise Poss, Personal Representative of the Estate of Louise W. Turner.

**OPINION**

**I.**

Carolyn Louise Poss, in her capacity as the Executrix of the Estate of Louise W. Turner, filed this action against Charles Daniel Turner (Defendant) to recover debts allegedly owed by Defendant to his mother, Louise W. Turner.<sup>1</sup> Three alleged debts are at issue. The first is evidenced by a promissory note in the amount of \$17,799 signed by Defendant on June 8, 1987. The second is evidenced by a promissory note in the amount of \$20,000 signed by Defendant on March 5, 1990. The third indebtedness is not evidenced by a promissory note; instead, it is evidenced by a \$16,000

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<sup>1</sup>Teresa Ann Crabtree, a daughter of Decedent, and her husband, Bradley W. Crabtree, were also named as defendants in the original complaint. The trial court ruled against the Crabtrees, who have chosen not to appeal the adverse judgment. The Crabtrees are not parties to this appeal.

check dated May 19, 2000, that was payable to Mrs. Turner. She and Defendant endorsed the check, and it was deposited in the account of the Circuit Court Clerk to pay a delinquent judgment against Defendant for a child support arrearage.

Defendant admits borrowing \$17,799, as evidenced by the promissory note dated June 8, 1987; however, he contends he paid back the loan over time in cash, checks, housing for which his mother did not pay rent, and service and repair to his mother's automobiles. Defendant, however, produced no records to support this contention.

As for the second promissory note in the amount of \$20,000, dated March 5, 1990, Defendant denies being obligated on this note, contending he never borrowed the money. He admits signing the \$20,000 note but insists it was merely a "dummy note," one that was drafted to protect his mother while he was involved in a bitter domestic dispute with his ex-wife. The trial court, however, found that Defendant's intention was not to protect his mother but to defraud his ex-wife.

Defendant testified at trial that he executed a Deed of Trust in the amount of \$38,858 in favor of his mother. This amount is said to account for both the \$17,799 and \$20,000 promissory notes and interest on the principal amount. As evidence that Defendant repaid the promissory notes, he testified that his mother executed a Release of the Deed of Trust. However, neither the Deed of Trust nor the Release of the Deed of Trust were introduced at trial.

The third alleged indebtedness is not evidenced by a promissory note. The only documentation to support the Executrix' claim is a \$16,000 check, dated May 19, 2000, that was payable to his mother. Although the check was payable to Mrs. Turner, both she and Defendant endorsed the check, and then the check was deposited with the Warren County Circuit Court Clerk's Office and applied to Defendant's child support arrearage.<sup>2</sup>

Following a bench trial on all three claims, the trial court found in favor of the Estate on all three claims. Significantly, the trial court found that Charles Daniel Turner was "an unbelievable witness, unworthy of belief." This finding was re-affirmed by the trial court in its Memorandum Opinion.<sup>3</sup> The sum of the judgment against Defendant for the three obligations totaled \$138,747. This amount represents the principal of the two promissory notes, the accrued interest and the

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<sup>2</sup>The Executrix testified that she drafted a promissory note in the amount of \$16,000 for Defendant to sign to document Defendant's obligation to his mother, but Defendant never signed the note.

<sup>3</sup>The March 28, 2005, Opinion and Judgment reads, "The Court resolved at the hearing and now re-affirms the belief that Charles Daniel Turner was an unbelievable witness, unworthy of belief, and re-affirms its resolving all issues of credibility against him once again."

attorneys' fees on the two promissory notes, and an award of \$16,000<sup>4</sup> for the alleged indebtedness evidenced by the check dated May 19, 2000.<sup>5</sup>

Defendant appeals contending the judgment of the trial court is contrary to the preponderance of the evidence. He also contends the trial court: (1) abused its discretion in refusing to allow an oral amendment to answer raising the state of limitations defense, (2) erred in its application of law of advancements, and (3) abused its discretion in failing to remove Carolyn Louise Poss as Executrix of the estate.

## II. THE TWO PROMISSORY NOTES

Two of Defendant's alleged obligations to the estate are evidenced by promissory notes signed by Defendant. The signed promissory notes provide *prima facie* evidence of the existence of obligations in the amount of \$17,799 and \$20,000. Defendant argues that the judgment of the trial court is contrary to the preponderance of the evidence. It is not.

Our review of findings of fact by the trial court is de novo upon the record, accompanied by a presumption of the correctness of the findings, unless the preponderance of the evidence is otherwise. Tenn. R. App. P. 13(d). On review, we accord considerable deference to the trial court's determination of credibility and the weight of oral testimony. *Tenn-Tex Properties v. Brownell-Electro, Inc.*, 778 S.W.2d 423, 425 (Tenn. 1989). "Where the issue for decision depends on the determination of the credibility of witnesses, the trial court is the best judge of the credibility and its findings of credibility are entitled to great weight. This is true because the trial court alone has the opportunity to observe the appearance and the demeanor of the witnesses." *Id.* at 426.

Defendant admits signing two promissory notes in the respective amounts of \$17,799 and \$20,000. The signed promissory notes provide *prima facie* evidence of the existence of the \$17,799 and \$20,000 obligations. *See Ingram v. Earthman*, 993 S.W.2d 611, 631 (Tenn. Ct. App. 1998) (holding in an action on a promissory note, the holder makes out a *prima facie* case by producing the note signed by the maker and by showing that there is a balance due on the note)(citations omitted). The defense is limited to Defendant's own testimony, which the trial court found to be unworthy of belief and for which the trial court resolved all issues of credibility against him. Having no substantial evidence in the record other than his own discredited testimony to dispute the *prima facie* evidence that he was obligated on the two promissory notes, we affirm the trial court as to the two promissory notes.

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<sup>4</sup>There is a discrepancy throughout the record as to the actual amount at issue. At times it reads \$16,000; at other times it reads, \$16,468. As a consequence of our ruling, the actual amount is of no consequence.

<sup>5</sup>The trial court issued a Memorandum Opinion and Judgment of August 4, 2004, an Order of November 15, 2004, an Order of December 29, 2004, and an Opinion and Judgment of March 28, 2005. After being altered and amended, the Orders and Judgments, being read together, demonstrate the final judgment in favor of the Estate in the amount of \$138,747.

### III. THE ENDORSED CHECK OF \$16,000

The estate's third claim against Defendant pertains to a \$16,000 check. Of the \$138,747 judgment the trial court granted against Defendant, \$16,000,<sup>6</sup> together with prejudgment interest at 6% per annum, represents "the amount advanced by Louise W. Turner which is not evidenced by a note. . . ." The trial court found this to be an "advancement" against Defendant's inheritance instead of a debt, as the estate had contended. Defendant contends the trial court erred in its application of the doctrine of advances, contending the \$16,000 given to him by his mother is not subject to the doctrine of advances because she died wholly testate and, therefore, cannot be offset against his inheritance. On this issue, we agree with Defendant.

The check, which was payable to Louise Turner, Defendant's mother, was endorsed by Defendant and his mother, deposited into the Warren County Circuit Court Clerk's office and credited against Defendant's delinquent child support arrearage. The Executrix asserted in the Complaint and Amended Complaint that Defendant "borrowed" the \$16,000 and, therefore, was indebted to his mother's estate in that amount. The trial court however found it was not an enforceable debt but a gift that constituted an "advancement" against Defendant's anticipated inheritance, and assessed that amount, plus interest, against Defendant's share of the inheritance.

The lack of a signed promissory note combined with insufficient direct or circumstantial evidence to prove a legally enforceable debt fully justified the trial court's finding that this was not a debt, as the estate had contended. The only documentary evidence to support the claim is the fact Defendant and his mother endorsed a \$16,000 check that was payable to his mother. What is missing is any direct evidence that this was a loan or that Defendant agreed to repay the funds. Although the Executrix testified that she prepared a promissory note in the amount of the check, \$16,000, that is of no consequence because Defendant never signed the note, and the Executrix was unable to prove it was a loan or a debt of Defendant, as distinguished from a gift. The Executrix' testimony and the endorsement do not prove an obligation instead of a gift. To the contrary, the evidence merely confirms that Defendant benefitted from his mother's willingness to deposit her \$16,000 check into the Clerk's office so that Defendant would not be jailed for repeatedly failing to pay his child support obligations.

The mere fact Defendant's mother transferred \$16,000 to him does not, without more, establish an indebtedness. To the contrary, Tennessee follows the view in numerous other jurisdictions that "an unexplained transfer of property from a parent to a child raises a rebuttable presumption that a gift was intended." *In re Hall*, 5 B.R. 120, 122 (Bankr. M.D. Tenn. 1980); *see also* 94 A.L.R.3d 608 (2006). A gift is "a voluntary transfer of property to another made gratuitously and without consideration." *See Dunlap v. Dunlap*, 996 S.W.2d 803, 816 (Tenn. Ct. App. 1998)

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<sup>6</sup>The judgment actually reads \$16,468 instead of \$16,000, which is the amount of the check. As we stated earlier, there is a discrepancy throughout the record as to the actual amount at issue.

(citing BLACK'S LAW DICTIONARY 619 (5th ed.1979)). A gift, however, may also be deemed an advancement against one's anticipated inheritance, in which event the amount of the "advancement" may be offset against the child's inheritance. *See* Tenn. Code Ann. § 31-5-101. An advancement is "a gift by a parent of a portion or all of the child's share in [the] estate which would fall to such child at the parent's death by the statute of intestate succession." 2 JACK W. ROBINSON, SR. & JEFF MOBLEY, PRITCHARD ON WILLS AND ADMINISTRATION OF ESTATES § 839, at 485 (5<sup>th</sup> ed. 1994) (citing *Laman v. Craig*, 206 S.W.2d 309 (Tenn. Ct. App. 1947); *Johnson v. Patterson*, 81 Tenn. 626 (1884)); *see also Jones v. Jones*, 163 Tenn. 237, 43 S.W.2d 205 (1931) (holding that an advancement is a gift by a parent in anticipation of the child's share in the parent's estate).

The doctrine of advancements, however, only applies in certain circumstances, and this is not one of those circumstances. Significant to this case, the doctrine of advancements does not apply to wholly testate estates in Tennessee.<sup>7</sup> *See* 2 PRITCHARD § 839, at 487; *see also Matthews v. Barret*, 1991 WL 137581 (Tenn. Ct. App. July 29, 1991)(opinion on petition to rehear). Mrs. Turner, Defendant's mother, died wholly testate on June 15, 2002. Her Last Will and Testament provided that her four children, one of whom is the defendant, were to receive her estate equally, share and share alike. Because Mrs. Turner died wholly testate, the \$16,000 at issue constitutes a gift to Defendant, not an advancement and, therefore, cannot be offset against Defendant's inheritance even if it were proven to be an advance toward his anticipated inheritance.

The evidence is insufficient to establish that the \$16,000 check constitutes an enforceable debt. To the contrary, the evidence preponderates in favor of it being a gift; however, the gift cannot constitute an advancement due to the fact Defendant's mother died wholly testate. Accordingly, we vacate that portion of the award that pertains to the check of \$16,000 and interest thereon.

#### IV. STATUTE OF LIMITATIONS

Defendant contends that the trial court erred in refusing to allow him to plead the statute of limitations as a defense. Defendant did not raise the statute of limitations defense, however, until after the trial had begun. It was during the trial that Defendant first contended the claims on the two promissory notes were barred by the statute of limitations pursuant to Tenn. Code Ann. § 28-3-109. When Defendant made an oral motion to assert the statute of limitations defense after the trial had

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<sup>7</sup>The doctrine of advancements in Tennessee changed with the enactment of Tenn. Code Ann. § 31-5-101 effective January 1, 1998. *See* 2 PRITCHARD § 839, at 59 (rev. 5<sup>th</sup> ed. Supp. 2006). The statute provides that if an individual dies intestate, property the decedent gave during the decedent's lifetime to a child of the decedent is treated as an advancement against the child's intestate share *only if*:

- (1) The decedent declared in a contemporaneous writing, or the child acknowledged in writing, that the gift is an advancement; or
- (2) The decedent's contemporaneous writing or the child's written acknowledgment otherwise indicates that the gift is to be taken into account in computing the division and distribution of the decedent's intestate estate.

Tenn. Code Ann. § 31-5-101(a) (emphasis added).

begun, the trial court denied the motion. We find no error with the trial court's discretionary decision.

Affirmative defenses, including the statute of limitations, must be plead in response to a preceding pleading. Tenn. R. Civ. P. 8.03. Defendant failed to set forth the affirmative defense in any of his responsive pleadings. Having failed to set forth the affirmative defense in a responsive pleading as a matter of right, Defendant had to obtain leave of court to amend his pleadings to assert the defense. Tenn. R. Civ. P. 15.01. The grant or denial of a motion to amend the pleadings in accordance with Tenn. R. Civ. P. 15.01 is within the sound discretion of the trial court, and "[o]nce decided, such matters are seldom adversely reviewed on appeal unless abuse of discretion has been shown . . . ." *Wilson v. Ricciardi*, 778 S.W.2d 450, 453 (Tenn. Ct. App. 1989).

The applicable standard is as follows:

Under the abuse of discretion standard, a trial court's ruling "will be upheld so long as reasonable minds can disagree as to propriety of the decision made." *State v. Scott*, 33 S.W.3d 746, 752 (Tenn. 2000); *State v. Gilliland*, 22 S.W.3d 266, 273 (Tenn. 2000). A trial court abuses its discretion only when it "applie[s] an incorrect legal standard, or reache[s] a decision which is against logic or reasoning that cause[s] an injustice to the party complaining." *State v. Shirley*, 6 S.W.3d 243, 247 (Tenn.1999). The abuse of discretion standard does not permit the appellate court to substitute its judgment for that of the trial court. *Myint v. Allstate Ins. Co.*, 970 S.W.2d 920, 927 (Tenn.1998).

*Eldridge v. Eldridge*, 42 S.W.3d 82, 85 (Tenn. 2001). We are unable to conclude from the record that the trial court abused its discretion. Therefore, we affirm the trial court's ruling denying Defendant's oral motion to amend.

## **V. REMOVAL OF THE EXECUTRIX**

Defendant contends that the trial court abused its discretion in failing to grant a request for the removal of Carolyn Poss as Executrix. We find this contention is without merit.

In its Memorandum Opinion following the trial, the trial court found "nothing in the proof or exhibits to substantiate any fraud or other misconduct on the part of plaintiff either in her representative capacity or individually." We also find no such evidence. Moreover, Defendant failed to cite to any authority supporting his contention that the trial court erred in failing to remove the Executrix.

**VI.**  
**IN CONCLUSION**

The judgment of the trial court is affirmed in part and vacated in part, and this matter is remanded with costs of appeal assessed against Charles Turner.

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FRANK G. CLEMENT, JR., JUDGE